IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CLYDE MOODY, Plaintiff, v. SUSSEX CORRECTIONAL INSTITUTION, JOHN ELLINGSWORTH, JOHN DOE COMMISSIONER, JOHN DOE CAPTAIN, JOHN DOE LIEUTENANT, and JOHN DOE CORRECTIONAL OFFICER, Defendants.	)	Civil Action No. 01-374-SLR

MEMORANDUM ORDER

The plaintiff Clyde Moody is a pro se litigant who is presently incarcerated at the Delaware Correctional Center located in Smyrna, Delaware. His SBI number is 166562. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two step process. First, the court must determine whether the plaintiff is eligible for pauper status. On June 6, 2001, the court granted plaintiff leave to proceed in forma pauperis and ordered him to pay, within thirty days, an initial partial filing fee of $.66. Plaintiff paid the initial partial filing fee on June 21, 2001.

Once the pauper determination is made, the court must then determine whether the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).[1] If the court finds the plaintiff's complaint falls under any one of the exclusions listed in the statutes, then the court must dismiss the complaint.

When reviewing complaints pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1), the court must apply the Fed. R. Civ. P. 12(b)(6) standard of review. See Neal v. Pennsylvania Bd. of Probation and Parole, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997)(applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Pro se complaints are held to "less stringent standards than formal

[1] These two statutes work in conjunction. Section 1915(e)(2)(B) authorizes the court to dismiss an in forma pauperis complaint at any time, if the court finds the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. Section 1915A(a) requires the court to screen prisoner in forma pauperis complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints falling under the categories listed in § 1915A (b)(1).

pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The standard for determining whether an action is frivolous is well established. The Supreme Court has explained that a complaint is frivolous "where it lacks an arguable basis either in law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).[2] As discussed below, plaintiff's claims have no arguable basis in law or fact. Therefore, his complaint shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

II. DISCUSSION

The plaintiff alleges that the defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. Specifically, he alleges that sometime in the summer of 1985, he was locked in a room with no windows or ventilation and "suffered in the extreme heat." (D.I. 2 at 3a) The plaintiff further alleges that he suffered heat stroke and

[2] Neitzke applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915 (e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolousness under the prior section remain applicable. See § 804 of the PLRA, Pub.L.No. 14-134, 110 Stat. 1321 (April 26, 1996).

"cannot speak, write or communicate and [he] is paralyzed due to this stroke." (Id.)[3] The plaintiff requests compensatory damages in the amount of $1,000,000 and punitive damages in the amount of $1,000,000. The plaintiff also filed a motion for appointment of counsel (D.I. 3) along with the complaint. Because the court finds that the complaint is frivolous, the motion for appointment of counsel shall be denied as moot.

The plaintiff's Eighth Amendment claim is time-barred by the statute of limitations. "Limitations periods in § 1983 suits are to be determined by reference to the appropriate 'state statute of limitations and the coordinate tolling rules.'" Hardin v. Straub, 490 U.S. 536, 541 (1989)(citing Board of Regents, University of New York v. Tomanio, 446 U.S. 478, 484 (1980)). However, accrual of such claims are governed by federal law. See Albright v. Oliver, 510 U.S. 266, 280 n. 6 (1994)(Ginsburg, J. concurring). The relevant state statute of limitations for a personal injury action in Delaware is two years. See Del. CODE ANN. tit. 10 § 8119; Carr v. Dewey Beach, 730 F.Supp. 591 (D. Del. 1990).

[3] The allegation that the plaintiff is unable to communicate, concerned the court because the complaint was prepared by an inmate paralegal, Robert Dahl ("Dahl"). However, the plaintiff signed the compliant and apparently provided Dahl with the facts as well as his SBI number. Furthermore, a medical unit staff member merely noted on the plaintiff's request for his trust account summary that he is unable to read or write. (Id. at 9) Therefore, the court is satisfied that the plaintiff, and not Dahl is in control of this action.

Consequently, the plaintiff's Eighth Amendment claim accrued, when he knew or had reason to know of the injury that forms the basis of this action. Carr, 730 F.Supp. at 601. It is clear from the complaint that the plaintiff's claim accrued sometime in the summer of 1985, when he was locked in a hot cell with no ventilation or fresh air. Although the plaintiff alleges that he was left incapacitated as a result of this incident, incapacitation does not toll the statute of limitations. The Delaware savings statute, Del. C. Ann. tit. 10 § 8116, does not toll the statute of limitations in personal injury actions. See Jamison v. Clark, No. 99C-03-265-WTQ, 1999 WL 744428 (Del Supr. July 30, 1999)(citing Hurwitch v. Adams, 52 De. 13, 18-19 (Del. Supr. 1959))("The savings statute that permits tolling during mental incompetency 10 Del. C. § 8116, however, does not apply to personal injury cases governed by Section 8119). Here, the plaintiff did not file his complaint until June 6, 2001, more than 15 years after he knew, or had reason to know of the injury that forms the basis of this action.

Because the statute of limitations is an affirmative defense ordinarily subject to waiver, sua sponte dismissal on this ground raises concerns of procedural fairness. However, prior to the enactment of the PLRA, several federal courts concluded that in forma pauperis claims which were time-barred were properly dismissed sua sponte as frivolous under 28 U.S.C. §

1915 (d). See e.g. Gartrell v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993)("Where it is clear from the face of the complaint filed in forma pauperis that the claims asserted are barred by the applicable statute of limitations, those claims are properly dismissed pursuant to § 1915(d)"); Myers v. Vogal, 960 F.2d 750, 751 (8th Cir. 1992)("Although the statute of limitation is an affirmative defense, a district court may properly dismiss an in forma pauperis complaint under 28 U.S.C. § 1915(d) when it is apparent the statute of limitations has run.")(per curiam); Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991) (per curiam); Clark v. Georgia Pardons and Paroles Board, 915 F.2d 636, 640 n.2 (11th Cir. 1990).

With the enactment of the PLRA, § 1915(e) not only retained the language of the former § 1915(d), it also added new provisions requiring the dismissal of in forma pauperis actions "at any time" if the district court finds the claims to be "frivolous, malicious, or for failure to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B). Thus, the court's sua sponte dismissal of clearly time-barred claims is not only appropriate, but required under the PLRA. See Johnstone v. United States, 980 F.Supp. 148, 154 (E.D. Pa. 1997)("When a complaint on its face shows that the action was filed outside of the applicable limitations period, and the court has satisfied itself that no legal rule tolls or otherwise abrogates the

limitations period, sua sponte dismissal is appropriate under § 1915."). It is clear from the face of the complaint, that the plaintiff's claim was filed well outside the two year limitations period and "no legal rule tolls or otherwise abrogates the limitations period." Id. The plaintiff's claim has no arguable basis in law and shall therefore, be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

NOW THEREFORE, IT IS HEREBY ORDERED this 11th day of March, 2002, that:

1) The plaintiff's Eighth Amendment claim is dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

2) The plaintiff's motion for appointment of counsel (D.I. 3) is denied as moot.

3) The clerk shall mail a copy of the court's Memorandum Order to the plaintiff.

Sue L. Robinson
United States District Judge